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No. 09-763

Supreme Court, U.S.
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In The
Supreme Court of the United States

DARNIECE BAILEY TURNIPSEED,
RAMON TURNIPSEED, and RAYMOND THOMAS,
individually and on behalf of a class of
all others similarly situated,

Petitioners,

v.

DOROTHY BROWN, Clerk of the Circuit Court of
Cook County in her official capacity, and
THE COUNTY OF COOK,

Respondents.

On Petition For Writ Of Certiorari
To The Illinois Appellate Court

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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REPLY BRIEF FOR PETITIONERS

The major premise of Respondents' argument – that title to the bail bond deposits passes from the depositor to the Respondent clerk upon deposit – is false. As shown below, and explained in Petitioners' Petition for a Writ of Certiorari, Illinois law is clear that bail bond deposits remain private property unless and until forfeited by order of the court, or the court otherwise orders the use of the deposits to pay fines and other matters. (*See* Petition for Writ of Certiorari at 7-8.) Moreover, even if the parties created a contract upon the bail deposit, the trial court found that the clerk is not a party to that contract and the contract says nothing about Respondents' right to use Petitioners' and the Class members' private property without compensation. (App. 28.) The Illinois Appellate Court did not disturb these findings. As such, Respondents' contract-based arguments are red herrings. They do not undermine this Court's jurisdiction to hear and resolve this case, nor counsel that it should not do so.

Nothing in Respondents' Brief in Opposition refutes what Petitioners established in their Petition, that (1) the Illinois Appellate Court's decision conflicts with this Court's decisions in *Henkels v. Sutherland*, 271 U.S. 298, 46 S. Ct. 524 (1926); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 101 S. Ct. 446 (1980); *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 118 S. Ct. 1925 (1998); and *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 123 S. Ct. 1406

(2003); (2) the Illinois Appellate Court's decision also directly conflicts with the decision of the Montana Supreme Court in *Siroky v. Richland County*, 271 Mont. 67, 894 P. 2d 309 (Mont. 1995); (3) if allowed to stand, the Illinois Appellate Court's decision would sanction the automatic forfeiture of private property without due process, a practice repeatedly condemned by this Court; and (4) allowing the Illinois Appellate Court's ruling to stand would sanction the disturbing trend among states to use private property held only in custody to raise revenue for themselves, while sidestepping the constitutional requirement that they pay just compensation for that use.

As shown in Petitioners' Petition, this Court should issue a writ of certiorari to the Illinois Appellate Court, exercising its supervisory powers to review that court's decision in order to resolve the conflicts with decisions of this Court and the Montana Supreme Court, and to resolve the significant constitutional issues it presents.

I. THE ADEQUATE AND INDEPENDENT STATE GROUNDS DOCTRINE IS INAPPLICABLE AND SHOULD NOT AFFECT THIS COURT'S DECISION REGARDING CERTIORARI IN THIS MATTER.

The adequate and independent state grounds doctrine provides that the United States Supreme Court lacks jurisdiction to review a judgment of a state court that "rests on a state law ground that is

independent of the federal question and adequate to support the judgment." *Coleman v. Thompson,* 501 U.S. 722, 729, 111 S. Ct. 2546, 2553-54 (1991). As discussed, the state grounds proffered by Respondents here do not in fact exist.

Further, this Court has long recognized that even if a constitutional claim is rejected on non-federal grounds, "it is the province of this Court to inquire whether the decision of the state court rests upon a fair or substantial basis." *Demorest v. City Bank Farmers Trust,* 321 U.S. 36, 42, 64 S. Ct. 384, 388 (1944); *Broad River Power Co. v. South Carolina,* 281 U.S. 537, 540, 50 S. Ct. 401, 402 (1930).

So although Respondents correctly note that property interests are often created and defined by state law, *see Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161, 101 S. Ct. 446, 451 (1980), states may not "defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all," *Hughes v. Washington,* 389 U.S. 290, 296-97, 88 S. Ct. 438, 442 (1967) (Stewart, J., concurring). This Court made that clear in *Webb's*, in which it held that a state court could not redefine established private property rights as "public property" so as to avoid a constitutional takings claim. 449 U.S. at 164, 101 S. Ct. at 452 ("Neither the Florida Legislature by statute, nor the Florida courts by judicial decree, may accomplish [a taking] simply by recharacterizing the principal as "public money.").

In other words, private property is not an infinitely elastic concept that states are free to redefine as suits their will. *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 93, 100 S. Ct. 2035, 2047 (1980) (Marshall, J., concurring) ("I do not understand the Court to suggest that rights of property are to be defined solely by state law, or that there is no federal constitutional barrier to the abrogation of common-law rights by Congress or a state government. The constitutional terms 'life, liberty, and property' do not derive their meaning solely from the provisions of positive law.").

In the opinion below, however, the Illinois Appellate Court did exactly that: in a dramatic departure from its long-established rule that "interest follows principal," the Appellate Court simply eliminated an established private property right, and based thereon, concluded no compensation was due. The court held that Petitioners did not state a valid claim for interest because (1) Petitioners had no common law right to recover interest and (2) the silence of the bail bond statute with regard to interest indicated that the legislature did not provide Petitioners with a statutory right to it. (App. 21-22.) That decision, however, ignores well-established Illinois precedent that entitles Petitioners to the interest earned on their bail bond deposits, the taking of which is a violation of the Takings Clauses of the Fifth and Fourteenth Amendments. Respondents' refusal to acknowledge this precedent should not be the basis for denying certiorari.

Illinois courts have long recognized that interest is a private property right protected by the Constitution. In *Morton Grove Park Dist. v. Am. Nat'l Bank & Trust Co.*, 78 Ill. 2d 353, 362, 399 N.E.2d 1295, 1299 (Ill. 1980), for example, the Illinois Supreme Court specifically defined "property," as "every interest anyone may have in any and everything which is the subject of ownership, together with the right to possess, use, enjoy and dispose of the same." From that broad definition of "property," the court held:

> The earnings on the funds deposited are a mere incident of ownership of the fund itself. The "taking clause" provision [of the United States and Illinois Constitutions] applies to the earnings in the same manner, and with the same force, as it applies to the principal.

Morton Grove, 78 Ill. 2d at 362-63; 399 N.E.2d at 1299. Therefore, the court held, "[t]he use of the award money by the county treasurer, to earn interest which is not paid to the owner but to the county, is clearly a taking of private property for public use." *Id.*, 78 Ill. 2d at 362, 399 N.E.2d at 1299.

Thus, under Illinois law (1) the bail bond deposit remains private property, and (2) the interest earned on that private property is also private property. There is no adequate and independent state ground that would affect this Court's jurisdiction.

Moreover, while state courts do have latitude to overrule their own precedents, including those related to property rights, *Lucas v. S.C. Coastal Council*, 505

U.S. 1003, 1035, 112 S. Ct. 2886, 2903 (1992) ("The Takings Clause does not require a static body of state property law.") (Kennedy, J., concurring), that latitude is not a boundless license to sanction an uncompensated taking, *Hughes*, 389 U.S. at 296, 88 S. Ct. at 442 (Stewart, J., concurring) ("To the extent that the decision of the Supreme Court of Washington on that issue arguably conforms to reasonable expectations, we must of course accept it as conclusive. But to the extent that it constitutes a sudden change in state law, unpredictable in terms of the relevant precedents, no such deference would be appropriate.").

Here, the Illinois Appellate Court departed abruptly from clear precedent and eliminated a well-established property right. Consistent with this Court's long history of reviewing and reversing court decisions that change or eliminate constitutionally protected interests, that state court decision is not protected from review by the adequate and independent state grounds doctrine. *See, e.g., Phillips v. Wash. Legal Found.*, 524 U.S. 156, 118 S. Ct. 1925 (1998); *Webb's*, 449 U.S. 155, 101 S. Ct. 446.

II. PETITIONERS HAVE NOT WAIVED THEIR DUE PROCESS ARGUMENT.

The Illinois Appellate Court's decision makes the forfeiture of the earnings on an owner's property immediate and without recourse, essentially conditioning the exercise of one's constitutional right to bail on the sacrifice of one's property rights. This

immediate forfeiture violates the Due Process Clauses of the Fifth and Fourteenth Amendments, and is at odds with the Illinois bail bond statute's express reference to a bond as a "deposit" that can be "forfeited" only by order of a court. 725 ILCS 5/110-7(a), (f) & (g). Illinois courts have long viewed Respondents as mere custodians of the deposit. *A-1 Lithoplate, Inc. v. AFS Publ'g Co.*, 66 Ill. App. 3d 560, 562, 384 N.E.2d 395, 396 (Ill. App. Ct. 1978) ("Our view is that bail bond money held by a circuit court clerk, like any money held by any judicial officer in his official capacity, is in the custody of the law."). Now, under the Illinois Appellate Court's decision, Respondents take immediate title to the deposits without proceeding through the judicial process established by statute for forfeiture. What was once an established judicial procedure that afforded due process has now been rendered completely vestigial.

Petitioners did not waive the due process argument. Rather, at every turn in this litigation, Petitioners have argued that depositors have a constitutionally protected interest in their deposits until a court, after appropriate procedures, orders to the contrary. (App. 14.) The Illinois Appellate Court's decision mandates the immediate forfeiture of the earnings on private property upon deposit without any recourse and in excess of any legitimate administrative costs.[1] 725 ILCS 5/110-7(f) (10% of deposit is retained for "bail costs"). This violates this Court's

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[1] Petitioners do not contest these costs.

admonishment that "a citizen has a right to contest the forfeiture of his property, a right secured by the Due Process Clause." *Degen v. United States*, 517 U.S. 820, 822, 116 S. Ct. 1777, 1780 (1996).

Contrary to Respondents' assertion, there was no need to raise the due process argument in the proceedings below. From the face of the statute, the deposits have always remained the property of the owner. The only exception is when there is a court order forfeiting some or all of the bond. 725 ILCS 5/110-7(a), (f) & (g). The decision of the Illinois Appellate Court raises due process concerns for the first time, ones that Petitioners did not know about, and could not have known about, prior to the decision. If the forfeiture of all property rights ceases upon posting bail, then the forfeiture proceedings – which the Appellate Court ignored – required by the statute are completely superfluous.

Even if Petitioners could have raised their due process argument earlier, this Court may still consider it now. Illinois courts view waiver as "an admonition to the parties, rather than a limitation on a court of review." *Halpin v. Schultz*, 234 Ill. 2d 381, 390, 917 N.E.2d 436, 442 (Ill. 2009). A reviewing court may consider any issue "in order to maintain a sound and uniform body of precedent or where the interests of justice so require." *Id.* (citing *In re Estate of Funk*, 221 Ill. 2d 30, 97, 849 N.E.2d 366, 403 (Ill. 2006)). Both considerations apply to this petition. The need to maintain a uniform body of law governing the taking of incidents of ownership, as well as the need

to ensure that private property rights are not procedurally circumscribed, warrants consideration of all the issues in this case.

CONCLUSION

For the reasons set forth above, Petitioners pray that the Court grant a writ of certiorari to review the decision and judgment of the Illinois Appellate Court.

Respectfully submitted,

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